Supreme Court, U.S.
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No. 96-841

In The

Supreme Court of the United States

October Term, 1996

UAP/GA AG CHEM., INC. and CONAGRA, INC.,

Petitioners,

vs.

DENISE CHILDREE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	2
I. In Holding That Respondent Was Protected By § 3730(h), The Eleventh Circuit Correctly Relied Upon The Clear Nexus Which Exists Between Respondent's Conduct And The Furtherance Of A Potential False Claims Act Suit.	2
II. The Eleventh Circuit Decision Does Not Conflict With Any Decision Of This Court Or Any Federal Court.	5
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Childree v. UAP/GA AG Chem, Inc. and Conagra, Inc., 92 F.3d 1140 (11th Cir. 1996)	4, 5
Clemes v. Del Norte County Sch. Dist., 843 F. Supp. 583 (N.D. Cal. 1994)	3
Neal v. Honeywell, Inc., 33 F.3d 860 (7th Cir. 1994)	3, 4, 5, 8

Contents

Page

Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (10th Cir. 1995) 3, 8

United States v. Anton, 91 F.3d 1261 (9th Cir. 1996) 7, 8

United States v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996) 6, 7

Statutes Cited:

31 U.S.C. § 3730 ..... 4, 6, 7

31 U.S.C. § 3730(a) 3, 5

31 U.S.C. § 3730(h) 2, 3, 4, 5, 7

Rule Cited:

Supreme Court Rule 15.1 1

STATEMENT OF THE CASE

The opinion of the court of appeals correctly sets forth the facts and procedural history of this case. In the interest of making this brief concise, Respondent respectfully directs the Court's attention to the appellate court's opinion.

Pursuant to United States Supreme Court Rule 15.1, Respondent brings the following misstatements of facts contained in the petition to the Court's attention.

Petitioner misrepresents to this Court the circumstances surrounding Childree's copying documents concerning the fraudulent rebilling and taking these copies home. Petitioner states that the Department of Agriculture administrative hearing was where UAP/GA first discovered that Childree had copied the documents and taken them home. (Petition at 2). Childree contends that her supervisor, Darryl Mathis, was aware at the time she copied the documents and took them home that she was doing so. Based on this supervisor's knowledge of these actions at the time, Childree did not "surreptitiously" copy the documents as Petitioner alleges. (Petition at 4).

Petitioner also incorrectly states Childree's reasons for copying the documents. Petitioner asserts that Childree never planned to do anything with these documents and provided no justification for copying them and taking them home. (Petition at 4-5). While Childree readily admits that she did not plan to use these documents to file a *qui tam* action under the False Claims Act, Petitioner's statement that she did not plan to do anything with them is not entirely accurate. Childree copied these documents as proof of her suspicion of false claims which she had discussed with the ASCS official. Since these documents were represented as coming from her office, Childree felt she should have these copies to prove that she was not involved in their submission.

Finally, Petitioner misleads this Court as to Childree's conduct in furtherance of a False Claims Act suit. Petitioner states that it is undisputed Childree never assisted the government or anyone else who filed, threatened to file, or even considered filing a False Claims Act suit. (Petition at 5). Childree contends, however, that at the time she assisted the government in its investigation, she had no way of knowing whether the government would file a False Claims Act suit and no way to ensure this subsequent action.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not merit further review. The decision does not conflict with any decision of this Court or any federal court. Case law is clear that a False Claims Act (FCA) suit does not need to actually be filed in order to trigger protection for employees who help investigate fraud against the government.

I.

IN HOLDING THAT RESPONDENT WAS PROTECTED BY § 3730(h), THE ELEVENTH CIRCUIT CORRECTLY RELIED UPON THE CLEAR NEXUS WHICH EXISTS BETWEEN RESPONDENT'S CONDUCT AND THE FURTHERANCE OF A POTENTIAL FALSE CLAIMS ACT SUIT.

Petitioner incorrectly asserts that the decision of the court below expands the anti-retaliation provision of the False Claims Act to protect plaintiffs who have no palpable nexus to the statute. There is, however, a clear nexus in this case between the employee's conduct and the furtherance of a potential False Claims Act suit. The court below plainly relied on this nexus.

In 1989, Respondent conveyed evidence of possible fraud to a United States Department of Agriculture (USDA) official. This cooperation with the USDA led to her testimony in 1993 at a USDA administrative hearing. It is clear that her cooperation with the USDA administrative process is a protected activity under the whistleblower provision of the False Claims Act, 31 U.S.C. § 3730(h). Her production of evidence and testimony furthered an investigation that could have potentially resulted in a False Claims Act suit by the government. The fact that the government did not pursue this possible action does not remove Respondent's whistleblower protection under § 3730(h). *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995); *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 595-96 (N.D. Cal. 1994).

The phrase in § 3730(h), "an action filed or to be filed under this section," means that the section's retaliation protections apply to both a *qui tam* action brought by the employee and to a government action under § 3730(a). Few employees are aware of their ability to bring *qui tam* actions under this statute. Many employees will, however, engage in conduct in cooperation with a government fraud investigation. The protection provided to this latter group of employees must not be overlooked.

An employee's lack of specific intent to assist or further an actual FCA action is irrelevant. An employee who reports her concerns regarding potential false claims squarely fits within § 3730(h), regardless of the employee's enthusiasm or motivation. While the report may be at the employee's initiative, it also may be, under the statute, in response to questions posed by a government official or in response to a subpoena. Protection is provided for any lawful acts on behalf of the employee which would further an action "to be filed," regardless of the

employee's specific intent. As the court below correctly noted, "nothing in the language of § 3730 suggests that its protections are limited to those who were motivated by it." *Childree v. UAP/GA AG CHEM, Inc. and Conagra, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). The court found that the statute contained no knowledge requirement and declined to read one into it. *Id.*

Protection under the statute must be provided if an action, *qui tam* or by the government, was a possibility at the time the employee's lawful acts took place. *Neal*, 33 F.3d at 864. An employee is protected from retaliation "because of" any conduct which objectively falls within the realm of "lawful acts on behalf of the employee or others in furtherance of an action . . . to be filed." *Id.* An employee does not have to be aware of an actual suit at the time of her provision of evidence of fraud in order to be afforded protection from retaliation under the statute.

The statute identifies as protected acts "investigation for initiation of, testimony for, or assistance in an action. . . ." 31 U.S.C. § 3730(h). Clearly, an employee, such as Respondent, who conducts an investigation for initiation of a government action would be protected. Any employee's conduct in furtherance of a False Claims Act suit should be protected. All that is necessary to trigger such protection is lawful conduct that furthers an action that has been filed or is to be filed at some future date.

The government's action with regard to the evidence of fraud provided by the employee does not determine whether § 3730(h) protection is applicable. The employee often cannot appraise the importance of the fraudulent conduct or provide legal analysis of the evidence acquired. Government prosecution may be ill-advised due to cost or the favorability of settlement. Whistleblower protection for the employee cannot be conditioned upon such outcomes.

The correct approach to the "to be filed" language of § 3730(h) is provided by *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994), which calls for the application of the statute "according to how things stood at the time of the [protected] activity." Such an application avoids the problem of having the issue of employee protection decided by subsequent government action over which the employee has no control.

The decision of the court below is correct in not conditioning § 3730(h) employee protection on this subsequent government action. Rejecting a retrospective test, the court below joined the Seventh Circuit in holding that "§ 3730(h) protection is available not only where a false claims action is actually filed, but also where the filing of such an action, by either the employee or the government, was a 'distinct possibility' at the time the assistance was rendered." *Childree v. UAP/GA AG CHEM, Inc. and Conagra, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). The panel found that in light of Respondent's providing the USDA with information regarding fraudulent claims coupled with a USDA administrative finding of falsified documents and false leases, a § 3730(a) action was a distinct possibility at the time Respondent rendered her assistance. *Id.*

II.

THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY FEDERAL COURT.

Petitioner relies heavily on two court of appeal decisions to allege a conflict among the circuits regarding the extent of whistleblower protection. Respondent asserts, however, that, even after the publication of these decisions, the court below would reach the same decision without conflict.

The first case relied upon by Petitioner is *United States v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996). Petitioner contends that the decision of the court below is contrary to the Tenth Circuit's holding in *Century* that "the plaintiff has the burden of pleading facts which would demonstrate that defendants had been put on notice that plaintiff was either taking action in furtherance of a private *qui tam* action or assisting in an FCA action brought by the government." *Id.* at 1522.

The *Century* court noted that "the case law is clear that a retaliation claim can be maintained even if no FCA action is ultimately successful or even filed." *Id.* The key, according to the *Century* decision, is that the defendant must have been put on notice of the employee's engaging in "protected activity," that is taking some type of action regarding a potential FCA action. *Id.*

The Tenth Circuit decision is not inconsistent with the decision of the court below. The *Century* plaintiff's job responsibility was to monitor compliance with applicable medicaid requirements. *Id.* at 1517. As part of her job duties, she reported instances of noncompliance to her superiors. A subsequent government investigation which revealed deficiencies similar to those discovered by the plaintiff was simply a routine audit and was completely independent of plaintiff's intracorporate complaints. *Id.* The court, therefore, found that, since she had given no suggestion that she was going to report the noncompliance to government officials, the employee had not given sufficient notice of a potential § 3730 action. *Id.* at 1523.

Unlike the plaintiff in *Century*, Respondent, whose job was to handle billing, gave her employer ample notice of her conduct "in furtherance" of a § 3730 action. One month after reporting

her concerns of false claims to her supervisors, Respondent met, along with one of her supervisors, with a government official to whom she reported her concerns of false claims. This same supervisor was aware that Respondent then copied documents relating to these false claims as proof of her testimony and took them home. At that point, Respondent placed her employer on notice that a FCA action was a "distinct possibility." Moreover, as soon as Respondent received a subpoena to testify at the government administrative hearing, her employer was again placed upon notice of the "distinct possibility" of a FCA action and of Respondent's testimony in furtherance thereof.

The court below was not faced with the situation addressed in *Century*. Respondent placed her employer on notice of her conduct in furtherance of a possible § 3730 action by the government rather than merely warning them of the consequences of their conduct. Once placed on notice of an employee's lawful cooperation with the government in investigating false claims, an employer's retaliation against the employee based on this cooperation is unlawful. *Id.* at 1522. The finding of § 3730(h) protection for Respondent by the court below, therefore, is not inconsistent with the *Century* decision.

The second court of appeals case relied upon by Petitioner is *United States v. Anton*, 91 F.3d 1261 (9th Cir. 1996). Again, this decision is not inconsistent with the holding of the court below. In *Anton*, the Ninth Circuit held that the plaintiff failed to establish a claim under § 3730(h) since the record clearly showed that she was not investigating false claims on the part of her employer but was merely attempting to get her employer to follow state and federal regulations. *Id.* at 1269. The court noted that "correcting regulatory problems may be a laudable goal, but one not actionable under the FCA in the absence of actual fraudulent conduct." *Id.* The court found that the employee "was not whistleblowing as envisioned in the paradigm qui tam FCA action." *Id.*

As did the court below, the *Anton* court held that "specific awareness of the FCA is not required." *Id.* at 1269. The Ninth Circuit decision seems harmonious with that of the court below in that the plaintiff must simply "be investigating matters which are calculated, or reasonably could lead, to a viable FCA action." *Id.* (citing *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994) and *Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 950-52 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995). Respondent's actions in cooperating with the USDA in investigating false claims clearly could have reasonably led to a viable FCA action. The holding of the court below is not, therefore, inconsistent with the *Anton* decision.

Given the clear nexus between Respondent's cooperation with government officials and a potential False Claims Act suit, along with the absence of any conflicting federal decision, further review of this case is unmerited.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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